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In The
Supreme Court of the United States

OCTOBER TERM, 1949

CLIFFORD DWANE HELM,
Petitioner and Appellant Below,

vs.

STATE OF NEVADA,
Respondent and Appellee Below.

No. 571

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

STATEMENT

The petitioner petitions this Court for a Writ of Certiorari to review the final judgment of the Supreme Court of the State of Nevada affirming the judgment and sentence of imprisonment for life imposed upon the petitioner for murder of the first degree committed by him by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark. The opinion of the State Supreme Court being reported herein at pages 14–35, both inclusive, Transcript of Record, and there entitled "In the Supreme Court of Nevada, The State of Nevada, Respondent, v. Clifford Dwane Helm, Appellant, No. 3530." Rehearing denied. Transcript of Record, p. 36.

The statement of the case, subject to consideration by this Court, is substantially correct as set forth at pages 1–4, Petition for Writ of Certiorari.

Alleged Questions Involved

Petitioner at pages 4–5 of petition for the writ sets forth the questions there alleged to be involved in the instant proceedings. Briefly, such questions are:

1. Whether the discharge of the first jury amounted to an acquittal, and whether the second trial resulted in petitioner being then twice in jeopardy?

2. That the State Supreme Court has decided a Federal question of substance in a way not in accord with applicable decisions of the Supreme Court of the United States, by holding:

(a) That petititioner had not been placed once in jeopardy and denying his motion for an acquittal after the discharge of the first jury impanelled and sworn.

(b) That the conviction of petitioner was in violation of Article I, Section 8, Constitution of Nevada, providing that "No person shall be subject to be twice put in jeopardy for the same offense * * * nor deprived of life, liberty, or property, without due process of law * * *."

(c) That the conviction of petitioner was in violation of the Fourteenth Amendment to the Constitution of the United States in that he was deprived of his liberty without due process of law.

(d) That the conviction of petitioner was in violation of the Fifth Amendment to the Constitution of the United States in that he was deprived of his liberty as guaranteed by that amendment.

Points Involved

At pages 1–2 of supporting brief petitioner states the points involved:

1. That the discharge of the first jury, duly impanelled and sworn by the trial court, amounted to an acquittal because petitioner was placed in jeopardy when the trial judge declared a mistrial after said jury had been sworn, the District Attorney of Clark County, Nevada, had made his opening statement to the jury, and said jury had been placed in custody of officers for the duration of the trial.

2. That petitioner was denied due process of law when the first jury was discharged over the objection of petitioner and without his consent. Note—The record is barren of any objection on the part of the petitioner to the discharge of the first jury. Pages 7–8, Tr. R. The State Supreme Court stated in its opinion, "He neither specifically consented nor objected to the discharge of the jury." Pages 14–15, Tr. R.

JURISDICTION

The jurisdiction of this Court is invoked upon the ground that a Federal question was raised in the Court of the first instance by pleading (1) once in jeopardy for the offense charged, and (2) by petitioner's requesting and being denied the right to withdraw his plea of not guilty and substitute therefor a plea of once in jeopardy. Page 5, Pet.

THE RECORD IN THIS COURT DISCLOSES THAT THE FEDERAL QUESTIONS RELIED UPON BY PETITIONER WERE NOT RAISED IN, SUBMITTED TO, NOR DECIDED BY THE STATE COURTS

The record lodged in this Court nowhere discloses that any Federal question relied upon by petitioner here was submitted to and decided by the trial court and/or the State Supreme Court. It is axiomatic that in order to give this Court the jurisdiction to review the judgment of a State Court, because of the denial of any right, title, privilege or immunity claimed under the Constitution of the United States, it must appear on the record filed in this Court that such right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way and distinctly brought to the attention of the State Courts. Neither the petition for a rehearing, nor petition for writ of error, nor the assignments of error in the Federal Supreme Court, nor the certification of briefs by the Clerk of the State Court, can cure the failure of the record to show that a Federal question was raised and decided which would confer jurisdiction on this Court.

Farney v. Towle, 66 U. S. 350; Hoyt v. Thompson, 66 U. S. 518; Worthy v. County Commissioners, 76 U. S. 565; Leeper v. Texas, 139 U. S. 462; Miller v. Texas, 153 U. S. 535; Miner v. Georgia, 183 U. S. 559; Thomas v. Iowa, 209 U. S. 258; Harding v. People, 196 U. S. 78; Empire State-Idaho Min. & Dev. Co. v. Hanley, 198 U. S. 292; Mellon v. O'Neil, 275 U. S. 212.

The contention made in the highest court of a State may not be enlarged for the purpose of invoking the jurisdiction of this Court by assignment of errors made to bring it to this Court. Cleveland & Pittsburg R. R. Co. v. City of Cleveland, 235 U. S. 50. The Writ of Certiorari will be dismissed where granted upon the erroneous supposition that petitioner had properly raised and relied upon the indicated Federal question in the State Court. Missouri Pac. R. R. Co. v. Hanna, 266 U. S. 184; Lynch v. New York, 293 U. S. 52; 54 Am. Jur. 901, Sec. 263.

This Court's consideration of a case is limited to the questions presented by the petition for the Writ of Certiorari. Crown Cork & Seal Co. v. Ferdinand Gutmand Co., 304 U. S. 159; Wilson v. Cook, 327 U. S. 474. Such questions must be Federal questions asserted and submitted to the State Court. Meredith v. Winterhaven, 320 U. S. 228; Herndon v. Georgia, 295 U. S. 441; New York ex rel Cohn v. Graves, 300 U. S. 308; Williams v. Kaiser, 323 U. S. 471.

The Conviction of Petitioner Was Not in Violation of Fifth Amendment to Constitution of United States

There is no merit to the contention of petitioner that his conviction violated the Fifth Amendment. The Fifth Amendment operates exclusively in restraint of Federal power and has no application to States. Thorington v. Montgomery, 147 U. S. 490. This Court in United States v. Lanza, 260 U. S. 377, definitely settled such question by holding that "The 5th Amendment, like other guaranties in the first eight amendments, applies

only to proceedings by the Federal Government (Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672), and the double jeopardy therein forbidden is a second prosecution under authority of the Federal Government after a first trial for the same offense under the same authority."

Further, in Ex Parte Ceja, Dist. Ct. Nev., 52 Fed. 2d 634, and CCA 9, 52 Fed. 2d 635, it was definitely held that the Federal Act providing that the Nevada Constitutional Convention shall adopt the United States Constitution did not make the Fifth Amendment applicable to proceedings in the Nevada State Courts.

The Conviction of Petitioner Violated No Provision of the Fourteenth Amendment to the Constitution of the United States

In Buchalter v. New York, 319 U. S. at page 430, this Court said:

> "But the (14th) amendment does not draw to itself the provisions of State Constitutions or State laws. It leaves the States free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate; and does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in a State court."

This Court in well-considered cases has limited the scope and effect of the Fourteenth Amendment as applied to trials of criminal cases in State Courts. In Twining v. New Jersey, 211 U. S. 78, it was held that exemption from self-incrimination is not safeguarded as against State action by the provisions of such amendment that no State shall deprive any person of life, liberty or property without due process of law. In Maxwell v. Dow, 176 U. S. 581, it was held that the adoption of the Fourteenth Amendment did not have the effect of making all the provisions contained in the first ten amendments operative in State Courts, on the

ground that the fundamental rights protected by such amendments are by virtue of the Fourteenth Amendment to be regarded as privileges or immunities of citizens of the United States. The late expression of this Court on such question, as applicable here, is amply set forth in Palko v. Connecticut, 320 U. S. 319, where it is held that a conviction in a State Court of murder in the first degree on a second trial of a criminal prosecution after conviction of murder in the second degree had been set aside on an appeal taken by the state is not in derogation of any privileges or immunities that belong to the accused as a citizen of the United States, in violation of the Fourteenth Amendment.

Such is the effect of Avery v. Alabama, 208 U. S. 444, and Leeper v. Texas, 139 U. S. 462.

The State Supreme Court Has Not Decided a Federal Question of Substance in a Way Not in Accord With Applicable Decisions of This Court

The record before this Court fails to show that the petitioner in the trial court and in the State Supreme Court raised and/or submitted to either Court any Federal question. The opinion of the State Supreme Court is clear upon the point that that Court decided the matter upon State law and upon adequate State grounds. Pages 14–20, Tr. R.

However, even if it can be said that the State Court decided a Federal question of substance in such opinion, still such decision was and is not contrary to the applicable decisions of this Court.

The guiding rule for Federal Courts with respect to the application of the prohibition in the Fifth Amendment against double jeopardy was long ago laid down by this Court in United States v. Perez, 9 Wheat. (U. S.) 579. We quote from the recent case of Wade v. Hunter, 336 U. S. 684, at pages 689–690:

> When justice requires that a particular trial be discontinued is a question that should be decided by

persons conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in United States v. Perez, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

"* * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the Judges, under their oaths of office * * *."

The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. Under the rule a trial can be discontinued when particular circumstances manifest a necessity for so doing,

> and when failure to discontinue would defeat the ends of justice.

The rule thus stated has been consistently followed by this Court in Simmons v. United States, 142 U. S. 148; Logan v. United States, 144 U. S. 263; Thompson v. United States, 155 U. S. 271. An excerpt from Thompson v. United States is quoted with approval in the State Supreme Court's opinion herein. Pages 17–18, Tr. R.

So in the case at bar the Nevada Supreme Court departed in no particular from the broad principles announced in the Perez case and as so recently announced by this Court in the Wade v. Hunter case. The Nevada court simply applied those principles in deciding the case then before it, saying:

> In the present case, the court could either have proceeded in the trial knowing that the judicial machinery was legally defective and that a verdict of guilty would be set aside by this court on appeal, or the trial judge could declare a mistrial and begin anew. We regard it as clear that the ends of public justice demanded the latter course.

Conclusion

This Court has long adhered to the rule that where the decision of the State Court might have been either on a State ground or on a Federal ground and the State ground is sufficient to sustain the judgment, this Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (U. S.) 257; Walter A. Wood Mowing & Reaping Mac. Co. v. Skinner, 139 U. S. 293; Allen v. Arguimbau, 198 U. S. 149; Lynch v. New York, 293 U. S. 52.

In the final analysis, however, the record before this Court shows that the State Supreme Court decided the matter upon State grounds, and in so doing brought the case squarely within Barrington v. Missouri, 205 U. S. 483, wherein this Court said:

> In our judgment no Federal Question was involved.

Were this otherwise it would follow that we could decide in any case that the trial court abused its discretion under the laws of the State of Missouri, although the Supreme Court of that state had held to the contrary.

We respectfully submit the Writ of Certiorari should be denied.

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